

FEDERAL TRADE COMMISSION

16 CFR Part 455

Trade Regulation Rule; Sale of Used Motor Vehicles

53 FR 17658

May 17, 1988

**ACTION:** Analysis of public comments on staff compliance guidelines.

**SUMMARY:** The staff of the Federal Trade Commission publishes its analysis of the public comments received in response to its request for comment on the staff compliance guidelines for the Used Car Rule. This notice summarizes and analyzes the issues raised by the commenters and notes those parts of the guidelines that have been modified in response to the comments. The revised compliance guidelines are published in a separate notice in the Federal Register.

**FOR FURTHER INFORMATION CONTACT:** Joyce E. Plyler (202-326-3021) or Matthew D. Gold (202-326-3019), Attorneys, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580.

**TEXT: SUPPLEMENTARY INFORMATION:** The Division of Enforcement staff published compliance guidelines for the Used Car Rule in the Federal Register on May 18, 1987. The guidelines are meant to provide guidance concerning how the Rule applies in specific situations. They are the opinion of staff only and have not been adopted by the Commission and are not binding on the Commission. However, the guidelines serve as criteria for the staff in assessing compliance with the Used Car Rule.

Five comments were received during the 30-day comment period after publication of the guidelines.<sup>1</sup> Three comments were submitted by trade associations -- the National Automobile Dealers Association ("NADA"), the National Independent Automobile Dealers Association ("NIADA"), and the National Vehicle Leasing Association ("NVLA"). One bank holding company, First Virginia Banks, Inc., also commented. The fifth comment, from a consumer, did not make specific substantive comments about the guidelines and is not discussed here. The comments raised six substantive issues, which are discussed separately below, in the order of their appearance in the guidelines.

Based on its analysis of the comments, further review of the guidelines, and subsequent Commission action, the staff has made both substantive and editorial revisions.

A. Public Comments

1. Demonstrators

NADA objected to staff's interpretation that all demonstrators, including those still in service as demonstrators, must have a Buyers Guide posted on them before being shown to a consumer. In its comment, NADA distinguished between demonstrators that are "offered for sale" and those that are "available for sale."

Although NADA agreed that demonstrators are "used" vehicles, it contended that demonstrators are not "offered for sale" until they are taken out of demonstrator service and put on the car lot. While acknowledging that demonstrators are always "available" for sale, NADA argued that a salesperson who merely responds to a customer's questions about a demonstrator does not offer that vehicle for sale. NADA proposed that the guidelines instruct dealers that they must post Buyers Guides on demonstrator vehicles only after the demonstrators have been removed from service.

Staff rejects NADA's interpretation. We disagree that in used car sales there is a meaningful distinction between "offering" a vehicle for sale and making it "available" for sale. In staff's view, when a salesperson discusses a vehicle that is available for sale with a customer, and is willing to sell the vehicle, then that vehicle is "offered" for sale.

The guidelines have not been substantively revised on this issue, but the illustrations concerning demonstrators have been clarified. Illustration 2.6 has been modified to apply to situations in which demonstrators are still in service so that dealers will be guided on that specific issue. Illustration 2.7 in the former guidelines was deleted because staff agrees with NADA's suggestion that the illustration would not apply in the "real world" and therefore is not helpful to dealers. Dealers do not impose time or mileage restrictions within which demonstrators are not available for sale, as suggested in the former illustration.

## 2. Lessor/Lessee Sales

All three trade associations commented about sales of leased vehicles. NADA resubmitted the comments it made in the leasing company exemption proceeding, which was considered by the Commission in September, 1987.<sup>2</sup> n2 NADA commented during that proceeding that sales by any dealer, not just a lessor, at auctions, repossession lots, through solicitation for bids and by consignment should be exempted from the Rule. The Commission rejected the petitioners' and NADA's request to exempt sales to consumers through such methods.<sup>3</sup> n3 NADA's comment on the petitions for exemption raises no issues that have not been previously considered by the Commission. Staff has revised the guidelines to make them consistent with the Commission's decision.

NIADA and NVLA both disagreed with staff's advice that sales by lessors to buyers procured by lessees would be covered by the Rule if the lessees advertised the vehicles for sale, but would not be covered if the buyer approached the lessee about purchasing the vehicle. Staff's advice was prompted by its interpretation that the Rule intended to exclude only sales to buyers procured by individual lessees for the vehicles they had personally driven, and not to exclude sales when numerous buyers had been procured by lessees for vehicles the lessees had never driven, as in the case of leased fleets.

NIADA contended that the Rule should apply to all non-lessee or non-employee sales, regardless of how the buyers were procured. NVLA argued that the Rule should not apply to any sales by lessors to buyers procured by lessees because the Rule makes no distinction based on how purchasers are acquired by lessees.

Upon reconsideration of the Rule, staff agrees with NVLA. Section 455.1(d)(3) of the Rule excludes from its definition of dealer "a lessor selling a leased vehicle by or to that vehicle's lessee or to an employee of the lessee." (emphasis added). The Statement of Basis and Purpose (SBP) for the Used Car Rule, states:

The definition of dealer specifically excludes \* \* \* a lessor selling leased vehicles to the vehicle's lessee, to a buyer procured by the vehicle's lessee, or to the lessee's employee.<sup>4</sup>

Neither the Rule nor the SBP distinguishes between the methods a lessee uses to procure a buyer. Thus, staff deleted its advice that lessors would have to comply with the Rule for sales to buyers procured by lessees through advertising.

However, the Rule excludes only certain sales by lessors . It does not exclude lessees if the lessee offers for sale more than five vehicles within twelve months and therefore is a "dealer" as defined by the Rule. Thus, lessees offering for sale six or more vehicles within a year are responsible for complying with the Rule.

Staff has modified the guidelines to state that lessors are not required to comply with the Rule for sales to buyers procured by lessees, regardless of how the buyer is procured. Staff also has added a guideline stating that lessees will be required to comply with the Rule if they offer for sale, to persons other than their employees or dealers, six or more used vehicles within a year.

### 3. Disclosure of Mandatory Warranties

NIADA took exception to staff's advice that the Rule requires dealers to disclose on the Buyers Guide any warranty that they must provide as mandated by state or local law. NIADA analogized mandatory warranties to unexpired manufacturers' warranties because neither is a type of warranty provided voluntarily by the dealer and subject to negotiation. NIADA argued that because the disclosure of unexpired manufacturers' warranties is optional under the Rule, then the Rule must have meant to make disclosure of mandatory warranties optional as well.

Staff rejects NIADA's analysis because it draws an inapt parallel between dealer warranties mandated by law and unexpired manufacturers' warranties. The distinction between the two types of warranties is that the former must be honored by the dealer while the latter is the responsibility of the manufacturer. Section 455.2(b)(2) of the Rule states: "If you [the dealer] offer the vehicle with a warranty, briefly describe the warranty terms in the space provided." Although a dealer may be required by law to provide a warranty, such a mandatory warranty is nevertheless a dealer-offered warranty that must be disclosed.<sup>5</sup> Disclosure of warranties that a dealer must provide, as required by the Rule, is important to

ensure that consumers are aware of their potential rights to have repairs made by the dealer. Therefore, staff has not changed its guidance that warranties mandated by law must be disclosed on the Buyers Guide.

#### 4. Service Contracts

NADA requested that one minor word change be made in staff's explanation regarding the disclaimer of implied warranties when service contracts are sold. NADA suggested that staff substitute the words "enter into" for the word "sell" to make clear that implied warranty obligations attach only when a dealer enters into a service contract, i.e., when the contract obligates the dealer, rather than a third party, to perform services under the contract. If the dealer sells a third party service contract, the dealer may disclaim implied warranties in states allowing such disclaimers.

Although staff did not intend the word "sell" to include the sale of a third party contract, staff has substituted "enter into" for "sell" in order to make absolutely clear that only when a dealer "enters into" a service contract for any period of time within 90 days of sale may the dealer not disclaim implied warranties. The only sentence affected by this change now reads, "if you also enter into a service contract covering the engine for six months, you automatically provide an implied warranty on the engine."

#### 5. Sales Contract Disclosures

NADA questioned staff's guidance that final warranty terms must be identified in the contract of sale, arguing that it is unnecessary to include such terms in the sales contract since they must appear in a warranty document. The original guidelines stated: "You must include warranty information in the sales contract. (The warranty information may be printed in your sales contract, or it may be on a separate warranty page that is referred to and made part of your sales contract)" (emphasis in original).

Staff revised the guidelines to clarify that although final warranty terms must appear in one single document that is part of the contract with the consumer, they are not required to be placed in a document titled, "sales contract," or incorporated by reference into it. The contract with the consumer may include several documents, only one of which must include all of the warranty disclosures required by the Warranty Disclosure Rule.<sup>6</sup> However, neither the Used Car Rule nor the Warranty Disclosure Rule requires that warranty terms be referenced to or repeated in the "sales contract." In addition to revising the main text, staff deleted Illustration 4.2 to eliminate confusion on this issue.

These revisions merely clarify that warranty terms need not be placed in the sales contract as long as they appear in a separate document. Of course, the disclosure regarding incorporation of the Buyers Guide into the contract must be placed conspicuously in the sales contract as required by § 455.3(b) of the Rule.

#### 6. Financing Agreements

First Virginia Banks, Inc., NADA, and NIADA each commented that a "financing agreement" should not be required to include the foreclosure concerning incorporation of the Buyers Guide into the sales contract, contained in § 455.3(b) of the Rule.<sup>7</sup> The original guidelines had advised dealers that the financing agreement might have to include the incorporation disclosure if the financing agreement contained terms apart from those governing the financing of the transaction.

Staff agrees with the commenters that this guideline should be revised to state that a financing document must contain the § 455.3(b) disclosure only if the financing document is the only document used to record the transaction or if the document contains a clause stating that it is the complete and total agreement between the dealer and the consumer. Illustration 4.1 was revised to make this point.

## B. Other Revisions

Staff made two substantive changes that were unrelated to the comments. First, staff modified slightly its explanation of the Rule's exclusion of banks and financial institutions. Section 455.1(d)(3) states that the definition of dealer "does not include a bank or financial institution \* \* \*." The guidelines explain that the "definition of 'dealer' specifically excludes banks and financial institutions selling used vehicles forfeited as collateral on consumer loans." Staff has revised the guidelines to delete the phrase "forfeited as collateral on consumer loans."

Although the SBP specifically identified the sale of cars forfeited as collateral as a type of sale by banks that would be excluded from coverage,<sup>8</sup> this was only an illustration of one transaction that is excluded. The Rule itself unequivocally excludes banks and financial institutions. Deletion of the phrase "forfeited as collateral on consumer loans" will eliminate the incorrect implication that a bank's sale of used vehicles other than those forfeited as collateral would be covered by the Rule.

Second, staff revised its guidance concerning sales at auctions to make the guidelines consistent with the Commission's ruling in the proceeding denying exemptions to a number of automobile leasing companies.<sup>9</sup> The guidelines previously stated that sales at auctions are covered by the Rule if the auctions are open to consumers and advertised to consumers. The revised guidelines eliminate advertising as a condition to coverage of the Rule in auction settings and state that sales to consumers at any auctions that are open to consumers are covered by the Rule.

Finally, the staff made a number of nonsubstantive editorial changes. For example, all of the illustrations are now placed at the end of the text to make them easier to find within the document.

## C. Conclusion

In this notice, staff has analyzed comments on its initial compliance guidelines for the Used Car Rule and has noted a number of areas in which it agrees that changes in the guidelines are warranted. Final staff compliance guidelines for the Used Car Rule incorporating these changes are published in a separate notice in the Federal Register.

List of Subjects in 16 CFR Part 455

Used cars, Trade practices.

By direction of the Commission.

Emily Rock,  
Secretary.

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Endnotes:

1. The comments were placed on the public record in FTC File 215-54 and are labelled 109-1 through 109-5.
2. See 52 FR 34769 (1987) (Commission denial of petitions for exemption).
3. *Id.*
4. Statement of Basis and Purpose for the Used Car Rule ("SBP"), 49 FR 45692, 45708 (Nov. 19, 1984).
5. See *id.* at 45710.
6. 16 CFR Part 701 (1975).
7. NADA was apparently under the mistaken impression that the guidelines indicated that warranty terms must sometimes appear in a financing agreement. Illustration 4.1, which is the relevant section, applied only to the question of whether the § 455.3(b) disclosure should appear in the financing agreement.
8. 49 FR at 45708.
9. Staff made public its enforcement policy regarding consumer sales at auctions in a staff opinion letter to each of the leasing companies who had petitioned for exemption from the Rule.